CHUNG KHIAW BANK LTD.

v.

PENANG GARDEN SDN. BHD.

HIGH COURT MALAYA, PENANG
MOHAMED DZAIDDIN J
[ORIGINATING SUMMONS NO. 24-596-1989]
14 JUNE 1990

CONTRACT: *Deed of assignment - Principal benefits and obligations of assignor as purchaser - Whether assignor liable to pay service charges - Consent of person benefitting - Conditional benefit principle or pure principle of benefit and burden.*

Under a sale agreement (the agreement) H, (the assignor) had purchased from the defendant the said property. The plaintiff granted a loan to H for completion of the purchase; by way of security, H executed a loan agreement and a deed of assignment (the assignment) in favour of the plaintiff. H defaulted and consequent to an action by the plaintiff the said property was sold by public auction to N with a shortfall still due. The plaintiff submitted the deeds of assignment for the defendant's written consent as required under the terms of the agreement; the defendant refused to consent and demanded payment from the plaintiff for an amount being service charges and interest. The plaintiff seeks a declaration that it is not liable for the payment of this sum.

The issue for the Court was whether on its true construction, the agreement merely granted qualified or conditional rights, the qualification being the due observance of the obligations, or whether the agreement granted unqualified rights and imposed independent obligations.

Held:

[1] It is clear from the clauses in the agreement that the agreement prohibits any assignment of the assignor's contractual rights unless the previous written consent of the defendant has been detained. However the agreement also permits a purchaser to execute an assignment of his rights under the said agreement.

[2] On the true construction of the agreement and the assignment, the intention of the parties was to grant the unqualified right to the assignor upon payment of the full purchase price and was not dependent upon payment of service charges; the creation of an interest in the said property and possession thereof was distinct and independent from the burden created in the payment of service charges. The words "right, interest and title" in the said property were never intended to include the liability of the purchaser.

[Plaintiff's application allowed.]

Cases referred to:
Bagot Pneumatic Tyre Co. v. Clipper Pneumatic Tyre Co. [1902] 1 Ch 146
Cox v. Bishop [1857] 8 De G M & G 815
Tito v. Waddell (No. 2) [1977] 3 All ER 129

Other source referred to:
Chitty on Contract, Vol. 1, 25th Edn., para. 1309

For the plaintiff - Tan Gaik Choon; M/s. Lim Huck Aik & Co.
For the defendant - Teoh Soo Bee; M/s. K. Ahmad & Yong

JUDGMENT

Mohamed Dzaiddin J:

In this application the plaintiff prays for a declaration that it is not liable to pay the defendant a sum of RM85,069.63 being arrears of service charges and interest due and owing by Hipparion (M) Sdn. Bhd. ("the assignor") to the defendant under the sale agreement dated 13 April 1981 ("the agreement").

The assignor had purchased from the defendant a property known as the 3rd floor of Wisma Penang Garden standing on Lot 777 comprised in Grant (1st grade) No. 12891, S. 14, North East District, Penang ("the said property") and executed the agreement. On 3 September 1983 the plaintiff granted a loan of RM1,000,000 to the assignor to enable the company to complete the purchase of the said property and by way of security the assignor executed a loan agreement and a deed of assignment ("the said assignment") assigning absolutely to the plaintiff all its right, title and interest in and to the said property and under the agreement and the full benefit granted thereby and all stipulations therein contained with all remedies for enforcing the same. In the course of time, the assignor defaulted paying the instalments due to the plaintiff under the loan agreement. The plaintiff then commenced action against the assignor for an order that the said property be sold by public auction. Consequently, the said property was sold to Nepline Sdn. Bhd. for RM1,150,000, with a shortfall of RM548,802.80 still due to the plaintiff.

In the meantime, the plaintiff submitted to the defendant two deeds of assignment for the defendant's consent pursuant to s. 5.08 of the agreement, which prohibited any assignment of the said property without prior written consent of the defendant. The defendant, however, refused to give its consent and demanded payment from the plaintiff the aforesaid sum of RM85,069.63 due under s. 5.11 of the agreement. This section reads as follows:

> Payment of service charges
>
> From the date when the purchaser is entitled to possession of the premises and until the issue and transfer of the separate subsidiary title as hereinafter provided and the constitution of the Management Corporation the purchaser shall pay quarterly in advance to the vendor service charges for the premises.

Let me deal first with the sale agreement. Under the agreement, the principal obligations of the assignor as purchaser include an obligation to pay for outgoings, including quit rent, rates and assessment and in default it shall be lawful (but not obligatory) for the defendant as vendor to pay them on behalf of the assignor. (Section 5.01). Next, s. 5.08 stipulates that upon the title to the said property has been transferred to the purchaser pursuant to s. 6.04, the purchaser shall not without previous consent in writing of the vendor part with possession nor sell or transfer or assign his contractual rights to any person or persons. Such consent shall only be given if the purchaser shall have paid to the vendor the administrative expenses. Finally, under s. 5.11 it is obligatory for the purchaser to pay for service charges which he shall pay quarterly in advance from the date when he is entitled to possession until the issue and transfer of a separate subsidiary title, which shall also include interest on any late payment. (Section 10.01). The vendor's obligation under the agreement includes his taking reasonable steps to obtain a separate subsidiary title. Section 6.04 stipulates that upon the issuance of the subsidiary title and provided that the purchaser shall have paid the full purchase price and of other monies payable and shall have observed and performed all the terms and conditions under the agreement, the vendor shall execute a valid and registrable transfer of the said property in favour of the purchaser. Thus, it is clear

from the relevant sections cited above that the agreement prohibits any assignment of the assignor's contractual rights unless the previous written consent of the defendant has been obtained.

There is, however, a point which is worth mentioning here. I am referring to s. 4.03 which states that the vendor shall endeavour to obtain a loan for the purchaser and for the purpose of security for the loan the purchase is permitted either to execute an assignment of his rights under the said agreement or in the event the subsidiary title is available to charge the said property in favour of the financier. It can thus be seen here that s. 4.03 permits the purchaser to execute "an assignment of his rights under the said agreement."

Next, I move to consider the deed of assignment, which together with the loan agreement were executed as security for the loan given by the plaintiff to the assignor. The crucial clause therein states as follows:

> In consideration of the assignee having agreed to grant the said loan the assignor as beneficial owner hereby assigns absolutely to the assignee **all his right, title and interest in and to the property and under the said agreement and the full benefit granted thereby and all stipulations therein contained and** all remedies for enforcing the same.
> (The emphasis is mine.)

Now, the issue here is whether the above clause includes the assigning of the assignor's liability to pay the service charges under s. 5.11 and interest on late payment under the agreement. Therefore, when considering this issue it is imperative that it must be considered together with the relevant sections of the sale agreement.

First, in an assignment of a contract it is an accepted principle that the burden or liability cannot be transferred so as to discharge the original contractor without the consent of the other party because no one is obliged without his consent to accept the liability of a person other than him with whom he made his contract. See *Chitty on Contract* Vol. 1, 25th Edn., para. 1309. In *Bagot Pneumatic Tyre Co. v. Clipper Pneumatic Tyre Co.* [1902] 1 Ch 146, Vaughan Williams LJ held, citing the case of *Cox v. Bishop* [1857] 8 De G M & G 815 as authority, that it has never been the law that if a person receives the benefit which has resulted from a contract to which he is not a party, he has thereby taken upon himself the burden of the contract. However, in certain circumstances, an assignee may not be able to enjoy the benefits assigned without also assuming the obligations. For example, an instrument may be framed so that it confers a right that is conditional on certain restrictions being observed or certain burdens assumed. This is known as the conditional benefit principle. In *Tito v. Waddell* (No. 2) [1977] 3 All ER 129 Megarry VC distinguished this conditional benefit principle with a "pure principle of benefit and burden". This latter principle only arises where the right assigned and the burden, although arising under the same instrument, are independent of each other i.e., the instrument granted unqualified rights and imposed independent obligations. In such cases, the original party is bound by his covenants, but his successors in title may well become bound by them also under the principle of pure benefit and burden which becomes operational depending upon the circumstances in which the successors in title came into the transactions and in particular whether they expressly agree to take over not only the rights but also the liabilities. In determining this, the terms of any relevant document and the surrounding circumstances as a whole are material considerations (*Tito v. Waddell*) (No. 2) [1977] *supra* at pp. 291 and 292.

In the instant case, the question is whether on its true construction the agreement merely granted qualified or conditional rights, the qualification being the due observance of the obligations, or whether the agreement granted unqualified rights and imposed independent

obligations. In other words, the Court must ascertain whether on the true construction of the agreement, the assignor has merely a qualified right to the purchase of the said property and possession thereof (qualified by the obligation to pay services charges under s. 5.11) or is the right to possession unqualified and s. 5.11 imposes an independent obligation to pay the service charges. On the true construction of the agreement, in my opinion, the intention of the parties was to grant the unqualified right to the assignor upon payment of the full purchase price and was not dependent upon payment of service charges. It is clearly seen from s. 7.01 of the agreement that the assignor shall not be entitled to vacant possession of the said property until he shall have duly paid all moneys payable under the agreement, which means the purchase consideration but not the service charges because the assignor's liability to pay service charges would only arise as from the date of the assignor's entitlement to possession of the said property. Hence, I agree with the submission of Cik Tan for the plaintiff that on the true construction of the relevant sections of the agreement the intention of the parties was to create the benefit of an interest in the said property and possession thereof which was distinct and independent from the burden created in the payment of service charges.

On the interpretation of the crucial clause in the said assignment, in my opinion, the words "right, interest and title" in the said property were never intended to include the liability of the purchaser. First, if it was the intention of the assignor to pass his liability under the agreement to the plaintiff, the solicitors would have included the word "liability" without much fuss or difficulty. In fact, the express mention of the aforesaid words show a clear intention to exclude the assignor's liability under the agreement.

Secondly, applying the *ejusdem generis* rule, the words "all stipulations therein contained" must mean stipulations of a similar kind to the "right, interest and title" and full benefit under the said agreement. They cannot be taken to mean the liabilities under the agreement. Further the principle "*expressio unius est exclusio alterius*" (the express mention of one thing is the exclusion of another) would exclude the liability of the purchaser.

Thirdly, from the wording of s. 4.03 there is already a clear intention of the parties that the purchaser would only execute an assignment of his rights under the agreement for the purpose of security for the loan.

Therefore, on the true construction of the loan agreement and the assignment read together with the sale agreement, in my judgment, the liability of the assignor as purchaser under s. 5.11 of the agreement cannot be assigned to the plaintiff. Hence, the plaintiff cannot be made liable to the defendant for the arrears of service charges and interest for late payment incurred by the assignor. In the result, I allow the plaintiff's application in this originating summons with no order as to costs.

Also found at [1990] 2 CLJ 621